

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

OCT 05 2013

OFFICE OF
MANAGING DIRECTOR

Wayne Klein, Receiver
Klein & Associate, PLLC
10 E. Exchange Place, Suite 502
Salt Lake City, UT 84111

Applicant(s)/Licensee(s): **AM Radio 1440, Inc., AM Radio 1470, Inc., Radio 940, LLC, and Tri-State Media Corp.**
Waiver Request (Financial Hardship
47 CFR 1.1166(c))
Disposition: **Granted**
Stations: KPTO (AM), DKNFL, DKOBY,
and KITT.
FRN: 0010264364, 0019297332,
0011270535, and 0012180543
Fiscal Year (FY) 2013 Regulatory Fee
Filed: Sep. 11, 2013
Fee Control No.: RROG-13-00015665
Regulatory Fee Amount: \$5,350.00

Dear Mr. Klein:

This responds to Applicant's *Request*¹ to defer payment and waiver of the required Fiscal Year (FY) 2013 regulatory fees due for four stations on grounds of financial hardship. As we discuss below, we grant Applicant's *Request* that established good cause and that the public interest will be served.

¹ Fiscal Year 2013 Regulatory Fees, AM RADIO 1440, Inc. (KPTO), AM Radio 1470, Inc. (DKNFL), Radio 940, LLC (DKOBY), Tri-State Media Corporation (KITT), PETITION FOR DEFERMENT AND WAIVER OF FY 2013 REGULATORY FEES (Sep. 11, 2013) (*Request*) with six attachments: (1) *US Capital, Inc. v. Legacy Media Corp, et al.*, (5th Jud. Dist. Ct., Utah, # 090500982) Order Appointing Receiver for Corporate Defendants, To Serve Without Bond, (May 29, 2009) (Ex. 1); (2) *US Capital, Inc. v. Legacy Media Corp, et al.*, (5th Jud. Dist. Ct., Utah, # 090500982) Order Granting Emergency Motion To Approve Stipulated Resignation of the Receiver And To Substitute New Receiver (Sep. 25, 2009) (Ex. 2); (3) *US Capital, Inc. v. Legacy Media Corp, et al.*, (5th Jud. Dist. Ct., Utah, # 090500982) Order Amending Receivership Order To Include Radio 940, LLC (Dec. 31, 2009) (Ex. 3); (4) *US Capital, Inc., Involuntary Petition* (U.S. Bankr. Ct. D. Col.) (Nov 28, 2011) (Ex. 4); (5) Radio Stations Receivership, KITT Profit & Loss (Jan. 1, 2009 through Sep. 10, 2013), Radio Stations Receivership, KNFL Profit & Loss (Jan. 1, 2009 through Sep. 10, 2013), Radio Stations Receivership, KOBY Profit & Loss (Jan. 1, 2009 through Sep. 10, 2013), Radio Stations Receivership, KPTO Profit & Loss (Jan. 1, 2009 through Sep. 10, 2013) (Ex. 5); FCC 2013 Regulatory Fee Information Site, Broadcast Facility Regulatory Fee Information Lookup, KITT, FCC 2013 Regulatory Fee Information Site, Broadcast Facility Regulatory Fee Information Lookup, KNFL, FCC 2013 Regulatory Fee Information Site, Broadcast Facility Regulatory Fee Information Lookup, KPTO, FCC 2013 Regulatory Fee Information Site, Broadcast Facility Regulatory Fee Information Lookup, KOBY (Ex. 6).

Background

On September 11, 2013, Applicant filed its *Request* petitioning for deferment and waiver of the FY 2013 regulatory fees due for four stations (Stations) on grounds of financial hardship and because a Utah state court appointed a receiver to control certain assets that include the Station licenses.²

On May 29, 2009, and January 7, 2010, a Utah state court appointed a receiver for the Stations,³ and on July 8, 2010, the receivership court approved a credit bid sale of the Stations' assets to US Capital, Inc., who was both the secured lender of the Stations and the beneficiary of the receivership; however, on November 28, 2011, before the parties could finalize the transfer of the licenses, US Capital was involuntarily placed in a Chapter 11 bankruptcy that was converted to Chapter 7 liquidation bankruptcy.⁴ Applicant provided financial documentation covering the period from January 1, 2009, to September 10, 2013, showing that three Stations reported no income, but significant expenses, and one Station had revenue, but significant expenses resulting in a substantial negative net income.⁵ Applicant asserts the deferral and waiver will allow the Stations to preserve assets and relieve a possible impediment to the negotiations leading to transfers.⁶ On November 13, 2012, Applicant requested cancellation of two related Stations, KOBV (AM) and KNFL (AM).⁷

Standards

In establishing the regulatory fee program mandated by Congress,⁸ the Commission set out the relevant schedules of the annual fees and the established the procedures for, among other matters, payment, waivers, reductions, and deferral, payment, refunds, error claims, and penalties.⁹

As to the waiver provision at 47 U.S.C. § 159(d), the Commission recognized that in certain instances payment of a regulatory fee may impose an undue financial hardship upon a licensee and the fee may be waived, reduced or deferred, but only upon a showing of good cause and a finding that the public interest will be served thereby.¹⁰ The

² *Request* at 1.

³ *Id.* at 2.

⁴ *Id.*, Ex. 4.

⁵ *Id.* at 3, Ex. 5.

⁶ *Id.* at 4.

⁷ Letter from Dale E. Bickel, Senior Engineer, Audio Division, Media Bureau, FCC to Mr. Scott Woodworth, Edinger Associates, Inc., 1875 I St., N.W., Suite 502, Washington, DC 20006 (Nov. 19, 2012) (cancellation of KOBV (AM)); Letter from Dale E. Bickel, Senior Engineer, Audio Division, Media Bureau, FCC to Mr. Scott Woodworth, Edinger Associates, Inc., 1875 I St., N.W., Suite 502, Washington, DC 20006 (Nov. 19, 2012) (cancellation of KNFL (AM)); *Request* at 2.

⁸ See 47 C.F.R. § 1.1151.

⁹ See 47 C.F.R. Part 1, Subpart G.

¹⁰ 47 U.S.C. § 159(d); 47 C.F.R. § 1.1166 ("The fees ... may be waived, reduced or deferred in specific instances, on a case-by-case basis, where good cause is shown and where waiver, reduction or deferral of the fee would promote the public interest."); Implementation of Section 9 of the Communications Act,

Commission has narrowly interpreted its waiver authority to require a showing of compelling and extraordinary circumstances that outweigh the public interest in recouping the Commission's regulatory costs.¹¹ In an appropriate situation, we may grant fee relief based on a "sufficient showing of financial hardship."¹² In such matters, "[m]ere allegations or documentation of financial loss, standing alone," do not suffice, and "it [is] incumbent upon each regulatee to fully document its financial position and show that it lacks sufficient funds to pay the regulatory fee and to maintain its service to the public."¹³ Thus, in order to establish a basis for waiver predicated on financial need, the regulatee must provide financial documents including, e.g., a licensee's balance sheet and profit and loss statement (audited, if available), a cash flow projection for the next twelve months (with an explanation of how calculated), a list of their officers and their individual compensation, together with a list of their highest paid employees, other than officers, and the amount of their compensation, or similar information.

Where relevant, the fact that the licensee is in bankruptcy or related receivership¹⁴ may be evidence of financial hardship; however, that fact will not relieve the petitioner of meeting the standard. We review each request, including those in which bankruptcy or receivership is asserted, on a case-by-case basis to determine whether the public interest warrants a waiver of the fee, and we may decline such a request.¹⁵

As set forth in 47 C.F.R. § 1.65, "[e]ach applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application ... whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall promptly as possible and in any event within 30 days ... amend the application ... so as to furnish such additional or corrected information"

"The term, application, includes in addition to petitions and applications elsewhere defined in the Commission's rules, any request, as for assistance, relief, declaratory ruling, or decision, by the Commission or on delegated authority."¹⁶ As part of our established procedures, "[a]n application (including a petition for reconsideration or any application for review of a fee determination) ... will be examined to determine if the applicant has paid the appropriate application fee, appropriate regulatory fees, is delinquent in its debts owed the Commission, or is debarred from receiving Federal benefits (*see, e.g.*, 31 CFR 285.13; 47 CFR part 1, subpart P)."¹⁷ Furthermore,

Assessment and Collection of Regulatory Fees for Fiscal Year 1994, *Report and Order*, 9 FCC Rcd 5333, 5344, ¶ 29 (1994), *recon. granted in part*, 10 FCC Rcd 12759 (1995) (*FY 1994 Report and Order*).

¹¹ *Id.*

¹² Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, *Memorandum Opinion and Order*, 10 FCC Rcd 12759, 12761-62, ¶ 13 (1995) (*FY 1994 MO&O*).

¹³ *Id.*

¹⁴ We require evidence that the licensee is in bankruptcy or receivership based upon appropriate financial purposes, e.g., to protect, preserve, and potentially enhance the value of the assets and maintain operations.

¹⁵ Assessment and Collection of Regulatory Fees for Fiscal Year 2003, *Report and Order*, 18 FCC Rcd 15985, 15989-90, ¶¶ 11, 13, 14 (2003) (*FY 2003 R&O*).

¹⁶ 47 C.F.R. § 1.1901(d).

¹⁷ 47 C.F.R. § 1.1910(a)(1).

“[a]pplications by any entity found not to have paid the proper application or regulatory fee will be handled pursuant to the rules set forth in 47 CFR part 1, subpart G.”¹⁸ Additionally, “[a]ction will be withheld on applications, including on a petition for reconsideration or any application for review of a fee determination, or requests for authorization by any entity found to be delinquent in its debt to the Commission (see §1.1901(i))¹⁹ ... If a delinquency has not been paid or the debtor has not made other satisfactory arrangements within 30 days of the date of the notice provided pursuant to paragraph (b)(2) of this section, the application or request for authorization will be dismissed.”²⁰ Consistent with 47 U.S.C. § 159(c)(2) and 47 C.F.R. §§ 1.1164, 1.1166, and 1.1910, when an applicant for relief is delinquent in paying the regulatory fee, the Commission will dismiss²¹ the request for relief and impose the statutory penalty.²²

Discussion

Applicant established both good cause and that deferral and waiver would promote the public interest. Even so, Applicant failed to amend its application to maintain accurate and complete information, and to establish in the *Request* the relevance of the receiver appointed by the Utah state court.

Applicant failed in its duty under 47 C.F.R. § 1.65 to maintain “the continuing accuracy and completeness of information [and] whenever the information furnished ... is no longer substantially accurate and complete in all significant respects ... to amend the application.” Specifically, Applicant failed to notify us that in February and March, 2013, it had entered into three purchase agreements to sell Stations KENT, KOGN (AM), and KPTO (AM),²³ and that in May, 2014, it entered into a purchase agreement to sell Station KITT.²⁴ This information is relevant to Applicant’s obligation under our rules and

¹⁸ 47 C.F.R. § 1.1910(b)(1).

¹⁹ 47 C.F.R. § 1.1910(b)(2).

²⁰ 47 C.F.R. § 1.1910(b)(3).

²¹ 47 U.S.C. § 159(c)(2) (“The Commission may dismiss any application or other filing for failure to pay in a timely manner any fee or penalty under this section.”); 47 C.F.R. §§ 1.1164(e) (“Any pending or subsequently filed application submitted by a party will be dismissed if that party is determined to be delinquent in paying a standard regulatory fee or an installment payment.”); 1.1166(c) (“Waiver requests that do not include the required fees or forms will be dismissed unless accompanied by a petition to defer payment due to financial hardship, supported by documentation of the financial hardship.”).

²² 47 U.S.C. § 159; 47 C.F.R. § 1.1166; *Waivers, Reductions and Deferments of Regulatory Fees, Regulatory Fees Fact Sheet* (Sep. 5, 2013) 2013 WL 4773993 (F.C.C.) (“The Commission will dismiss any petition for waiver of a regulatory fee that does not include a payment or the required petition for deferral and supporting documentation, and under 47 U.S.C. § 159(c) and 31 U.S.C. § 3717, the Commission is required to impose the 25% penalty and other relevant charges. A request for waiver, reduction or deferral must be received before the fee due date. * * * The Commission will dismiss a waiver request filed by a delinquent debtor or a petition that does not have the required financial documentation.”).

²³ See FCC Form 314, Application for Consent to Assignment of Broadcast Station Construction Permit or License, BAL 20130228APY; FCC Form 314, Application for Consent to Assignment of Broadcast Station Construction Permit or License, BAL 20130313ABS; FCC Form 314, Application for Consent to Assignment of Broadcast Station Construction Permit or License, BAL 20130417AAU.

²⁴ See FCC Form 314, Application for Consent to Assignment of Broadcast Station Construction Permit or License, BALH 20140515AFH.

it presents information pertinent to whether good cause and that the public interest is served.

Next, Applicant points to the Commission's statement in *FY 1994 MO&O* referring to evidence of "bankruptcy or receivership" as sufficient to establish financial hardship and obtain a waiver. That is an incorrect simplification of the standard. When the Commission announced that evidence of bankruptcy or receivership is sufficient to establish financial hardship,²⁵ it was referring to federal court proceedings of a bankruptcy liquidation case and a federal court appointed receiver. The meaning does not extend to a reorganization proceeding under Chapter 11 and it does not excuse an applicant from justifying that a waiver is appropriate. For example, a party filing under Chapter 11 is not a *bankrupt*.²⁶ Specifically, a party initiating a proceeding under bankruptcy law seeking to reorganize and emerge with a plan does not establish good cause without including satisfactory financial documentation of hardship establishing that paying the fee will adversely impact the licensee's ability to serve the public.²⁷ Moreover, in 2003, the Commission explained, the applicant must show that a bankruptcy proceeding represents extraordinary and compelling circumstances justifying a waiver when balanced against the public interest in reimbursing the Commission for its costs as reflected in the statutory fee provisions.²⁸ Additionally, when the Commission referred to receivership proceedings, it was speaking of federal court proceedings, not procedures under state law that may permit receivership under numerous grounds including matters unrelated to financial hardship and an anticipatory sale of station assets. Here, for example, instead of Applicant showing this is a federal receivership, he relies on a Utah state court proceeding²⁹ that shows only the court appointed the receiver under

²⁵ *FY 1994 MO&O*, 10 FCC Rcd at 12761, ¶ 14.

²⁶ *Matter of Phillips*, 966 F.2d 926, 930 (5th Cir. 1992), *rehearing denied* (1992),

Congress consolidated federal bankruptcy law in the Bankruptcy Act of 1898. *See* Act of July 1, 1898, c. 541, 30 Stat. 544. At that time, bankruptcy law only facilitated liquidation. Not until 1933 did Congress amend the Bankruptcy Act to permit reorganization of certain entities. *See* Pub.L. No. 72-420, 47 Stat. 1474 (1933). In 1938, Congress amended the Bankruptcy Act with the precursor to Chapter 11 to facilitate general corporate reorganization. *See* Act of June 22, 1938, Pub.L. No. 74-575, 52 Stat. 840 (1938). Until Congress substantially revised the Bankruptcy Act with the Bankruptcy Reform Act of 1978, the Bankruptcy Act apparently referred to entities undergoing Chapter 7 liquidation as "bankrupts," and those undergoing Chapter 11 reorganization as "debtors." *See* S. REP. No. 989, 95th Cong., 2d Sess. 23 (1978), *reprinted in* Historical and Revision Notes following 11 U.S.C.A. § 101(12) at 36 (1979), *and reprinted in* 1978 U.S.C.C.A.N. 5787, 5809. But the Bankruptcy Reform Act of 1978 removed all references to "bankrupt" in federal bankruptcy law, created the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, and adopted "debtor" to refer to all who seek protection under the Code, whether they do so through liquidation under Chapter 7 or reorganization under Chapter 11. *See* 11 U.S.C. § 101 (12); *see generally* H.R. REP. No. 595, 95th Cong., 2d Sess. 3-5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 5965-66 (recounting Reform Act's history and purpose).

²⁷ *FY 1994 MO&O*, 10 FCC Rcd at 12761-62 ¶ 13.

²⁸ *FY 2003 R&O*, 18 FCC Rcd at 6090, ¶ 11.

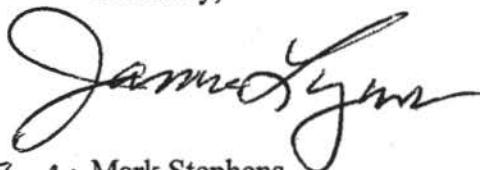
²⁹ *Request* at 4.

the authority of three sections of Utah Rules of Civil Procedure, Rule 66.³⁰ That is insufficient to establish good cause. The applicant must show the appointment was because of financial hardship and pursuant to federal law.³¹

Notwithstanding the impediments, Applicant demonstrated that during the period from January of 2009 to September of 2013, it had no income on three Stations, yet significant expenses, and revenue on a fourth Station that was insufficient to meet expenses. Moreover, in 2012, it surrendered two of the Station licenses and requested cancellation. Finally, the sales price for three stations is much less than Applicant's reported expenses. As such, Applicant demonstrated it lacks financial resources to pay the annual regulatory fees and that paying any amount of the four Station fees will affect the Applicant's ability to provide service.³²

If you have any questions concerning this matter, please contact the Revenue & Receivables Operations Group at (202) 418-1995.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Stephens", written in a cursive style.

BOL: Mark Stephens
Chief Financial Officer

³⁰ *Request*, Ex. 1 at 2; see Rule 66, Utah R. Civ. Pro. (Grounds for appointment— (1) an action in which property is in danger of being lost, removed, damaged or is insufficient to satisfy a judgment, (2) to carry the judgment into effect, (3) when a writ of execution has been returned unsatisfied or when the judgment debtor refuses to pay property in satisfaction of the judgment, (4) when a corporation has been dissolved or is insolvent or in imminent danger of insolvency or has forfeited corporate rights, or (5) in all other cases in which receivers have been appointed by courts of equity).

³¹ Federal Rule of Civil Procedure 66. See *Netsphere, Inc. v. Baron*, 703 F.3d 296, 306 (5th Cir. 2012); Wright & Miller, 12 Fed Prac. & Proc. Civ. § 2983 (2d ed.).

³² *FY 1994 MO&O*, 10 FCC Rcd at 12761-62 ¶ 13.